

DIAMOND MCCARTHY LLP
Stephen T. Loden, Esq. (*pro hac vice*)
J. Benjamin King, Esq. (*pro hac vice*)
Andrew B. Ryan, Esq. (*pro hac vice*)
909 Fannin, 15th Floor
Houston, TX 77010
Telephone: 713-333-5100
Facsimile: 713-333-5199
sloden@diamondmccarthy.com
bking@diamondmccarthy.com
aryan@diamondmccarthy.com
*Counsel for Allan B. Diamond,
Chapter 11 Trustee for Howrey LLP*

KORNFELD, NYBERG, BENDES & KUHNER, P.C.
Eric A. Nyberg, Esq. (Bar No. 131105)
Chris D. Kuhner, Esq. (Bar No. 173291)
1970 Broadway, Suite 225
Oakland, CA 94612
Telephone: 510-763-1000
Facsimile: 510-273-8669
e.nyberg@kornfieldlaw.com
c.kuhner@dornfieldlaw.com
*Local Counsel for Allan B. Diamond,
Chapter 11 Trustee for Howrey LLP*

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re

HOWREY LLP,

Debtor.

Case No. 11-31376 DM

Chapter 11

Date: January 11, 2013
Time: 10:00 a.m.
Ctrm: U.S. Bankruptcy Court
230 Pine Street
San Francisco, CA

Judge: Dennis J. Montali

**CHAPTER 11 TRUSTEE'S SURREPLY TO
WILLIAM MCGRANE'S SURREBUTTAL TO STAY MOTION**

Table of Contents

	<u>Page</u>
INTRODUCTION	1
ARGUMENT.....	3
I. <i>Ahcom</i> Did Not Interpret Section 541 To Exclude <i>Alter Ego</i> Rights	3
II. HC's Alleged Substantive Claim Is Property Of The Howrey Estate.....	5
III. Relevant <i>Alter Ego</i> Law Supports The Motion To Enforce	6
IV. <i>In Pari Delicto</i> Is Irrelevant To Who Has Standing To Bring <i>Alter</i> <i>Ego</i> Claims, And In Any Event It Would Not Bar The Trustee From Asserting Those Claims Against The Former Partners	8
V. No Creditor Has Come To HC's Defense Of Its Attempts To Independently Assert The Trustee's <i>Alter Ego</i> Claims.....	10
CONCLUSION.....	11

Table of Authorities

	<u>Page</u>
Cases	
<i>Ahcom, Ltd. v. Smeding</i> , 623 F.3d 1248 (9th Cir. 2010)	<i>passim</i>
<i>ANR Ltd., Inc. v. Chattin</i> , 89 B.R. 898 (D. Utah 1988)	7
<i>Bd. of Directors of the Chestnut Grove Condominium Unit Owners' Assoc.</i> <i>v. Resolution Trust Co.</i> , 161 B.R. 860 (D.D.C. 1993)	7
<i>CarrAmerica Realty Corp. v. Nvidia Corp.</i> , 302 Fed. Appx. 514 (9th Cir. 2008)	9
<i>Donell v. Nixon Peabody LLP</i> , 2012 WL 3839402 (C.D. Cal. Sept. 5, 2012)	9
<i>Drabkin v. L&L Constr. Associates, Inc. (In re Latin Inv. Corp.)</i> , 168 B.R. 1 (Bankr. D.C. 1993)	8
<i>Estate of Raleigh v. Mitchell</i> , 947 A.2d 464 (D.C. 2008)	7, 10
<i>Goldin v. Primavera Familienstiftung, TAG Assocs. (In re Granite</i> <i>Partners, L.P.)</i> , 194 B.R. 318 (Bankr. S.D.N.Y. 1996)	9
<i>Gutierrez v. Girardi</i> , 194 Cal. App. 4th 925 (Cal. App. 2011)	6
<i>Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven</i> <i>Seas Petroleum, Inc.)</i> , 522 F.3d 575 (5th Cir. 2008)	8
<i>Holt v. Kormann</i> , 2012 WL 2150070 (C.D. Cal. June 12, 2012)	6
<i>In re Buildings by Jamie, Inc.</i> , 230 B.R. 36 (Bankr. D.N.J. 1998)	8
<i>In re Greater Southeast Comm. Hosp. Corp. I</i> , 353 B.R. 324 (Bankr. D.D.C. 2006)	9
<i>In re Oakwood Homes Corp.</i> , 356 Fed. Appx. 622 (3d Cir. 2009)	9

1	<i>In re OODC, LLC,</i>	
2	321 B.R. 128 (Bankr. D. Del. 2005)	8
3	<i>In re S.I. Acquisition, Inc.,</i>	
4	817 F.2d 1142 (5th Cir. 1987)	7
5	<i>Mixon v. Anderson (In re Ozark Rest. Equip. Co., Inc.),</i>	
6	816 F.2d 1222 (8th Cir. 1987)	8
7	<i>Peterson v. McGladrey & Pullen, LLP (In re Lancelot Investors Fund,</i>	
8	<i>L.P.),</i> 676 F.3d 594 (7th Cir. 2012)	9
9	<i>Quinn v. Butz,</i>	
10	510 F.2d 743 (D.C. Cir. 1975)	10
11	<i>Raytheon Co. v. Boccard USA Corp.,</i>	
12	369 S.W.3d 626 (Tex. App.—Houston	
13	[1st Dist.] 2012, pet. denied)	7
14	<i>Rondberg v. McCoy,</i>	
15	2009 WL 3017611 (S.D. Cal. Sept. 21, 2009)	6
16	<i>Samson v. Rocky Mtn. Rec. Communities, LLC (In re Rocky Mtn. Rec.</i>	
17	<i>Communities, LLC),</i> 2012 WL 5248480 (Bankr. D. Mont. Oct. 23, 2012)	4
18	<i>Shearson Lehman Hutton, Inc. v Wagoner,</i>	
19	944 F.2d 114 (2d Cir. 1991)	9
20	<i>Shaoxing County Huayue Imp. & Exp. v. Bhaumik,</i>	
21	191 Cal. App. 4th 1189 (Cal. App. 2011)	4
22	<i>TAC-Critical Sys., Inc. v. Integrated Facility Sys., Inc.,</i>	
23	808 F. Supp. 2d 60 (D.D.C. 2011)	5, 8
24	<i>Tese-Milner v. Beeler (In re Hampton Hotel Investors, L.P.),</i>	
25	289 B.R. 563 (Bankr. S.D.N.Y. 2003)	9-10
26	<i>USACM Liquidating Trust v. Deloitte & Touche LLP,</i>	
	764 F. Supp. 2d 1210 (D. Nev. 2011)	9
	Statutes	
	11 U.S.C. § 101	9
	11 U.S.C. § 541	2, 4, 5

INTRODUCTION

HC's¹ counsel admits in his Surrebuttal² that HC's Complaint presents "somewhat novel legal ideas" and a "monumental issue." Surrebuttal at 2 n.3, 10:11. The Trustee agrees. Never before (to the Trustee's knowledge or, apparently, to HC's) has a creditor sought to bring an *alter ego* class action against a debtor's former owners to recover the same dollars the trustee is presently seeking to recover and for the express purpose of subverting the Bankruptcy Code's "absolute priority rule." HC Complaint at ¶ 316. Certainly, HC's Complaint is novel.

HC's approach is also monumental because it threatens the administration of not only the Howrey estate, but of every law firm bankruptcy. In every major law firm bankruptcy, recoveries from the former partners are one of the principal, if not the principal, sources of recoveries for the debtor. If a class of creditors may pursue the law firm's former partners, taking their assets and leaving fewer or none for the debtor, secured lenders will be reluctant to fund the administration of law firm estates. Trustees will still have causes of action against the former partners, but the value of those claims will be substantially diminished because the former partners' resources necessarily have limits. Litigation of the competing claims of the class and the trustee will be unworkable. Class members will opt out to pursue their own, individual *alter ego* claims, complicating matters even further. The former partners will be reluctant to settle with anyone because they can never have finality over their liability.

Fortunately, there is a good reason why HC's "novel" approach has never been allowed: it lacks legal basis. As demonstrated in the Trustee's prior briefing, only the Trustee has standing to recover from the Former Partners as *alter egos* of Howrey. In the **fourth** briefing by

¹ This Surreply adopts the abbreviations and capitalized terms used in the Trustee's prior briefs in support of his Motion to Enforce.

² Interested Party William McGrane's (i) Surrebuttal To Trustee's Amended Stay Motion And (ii) Initial Response To Joinders By Committee And Citibank Thereto (Doc. # 905) (the "Surrebuttal").

1 HC or its counsel in opposition to the Stay Motion, the Surrebuttal revisits several arguments this
2 Court should reject:

3 **First**, the Surrebuttal argues that *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248 (9th Cir. 2010),
4 holds that 11 U.S.C. § 541 excludes *alter ego* rights from “property of the estate” if *alter ego* is a
5 “remedy” rather than a “claim.” *See* Surrebuttal § I. HC’s counsel very badly wants this Court
6 bound to interpret D.C. law the way *Ahcom* interpreted California law, so the Surrebuttal argues
7 that *Ahcom* was based on an interpretation of Section 541, which this Court is bound to follow.
8 But *Ahcom* does not interpret Section 541 at all. Instead, *Ahcom* interprets California law, which
9 does not apply here. *See infra* § I.

11 **Second**, the HC Complaint’s money had and received claim does not complain about
12 money taken from HC (or Jan Brown) and transferred to anyone. It complains about money
13 taken from Howrey and transferred to the Former Partners. HC’s sole claim for relief in its
14 Complaint is for money had and received, but the only feasible money had and received claim
15 alleged is Howrey’s—based on money transferred from Howrey transferred to its Former
16 Partners. HC and its counsel failed in their three prior attempts to explain how HC has stated a
17 money had and received claim owned by HC, and they failed again in the Surrebuttal. *See infra*
18 § II.

20 **Third**, the weight of authority holds that trustees, and only trustees, have standing to
21 bring *alter ego* claims against the debtor’s former owners or controllers. Nothing in the
22 Surrebuttal demonstrates that this Court should find D.C. law at odds with the majority of
23 jurisdictions reaching this reasonable conclusion. *See infra* § III.

25 **Fourth**, the longest section in the Surrebuttal addresses the least significant issue—in
26 *pari delicto*. This defense will not apply to claims by the Trustee against the Former Partners, at
least not to claims by the Trustee against the Former Partners who could conceivably be subject

1 to *alter ego* liability. But even if the defense would apply to the Trustee's *alter ego* claims, that
2 has nothing to do with who—the creditors or the debtor—owns the claims. Simply stated,
3 whether *in pari delicto* is a valid defense to claims the Trustee might bring is irrelevant to the
4 question of who has standing to bring those claims. *See infra* § IV.

5 **Fifth**, the Surrebuttal argues that denying the Motion to Enforce will allow for the fair
6 resolution of the class's *alter ego* claims through a confirmed plan. To the contrary, achieving a
7 confirmed plan will be next to impossible if HC is allowed to pursue its ill-conceived *alter ego*
8 claims against the Former Partners. Moreover, the Surrebuttal's argument incorrectly assumes
9 that HC and the class have any *alter ego* claims to resolve. *See infra* § V.

11 For these reasons, and those set forth in the Trustee's prior briefing in support of the
12 Motion to Enforce, this Court should grant the Motion to Enforce.

14 **ARGUMENT**

15 **I. Ahcom Did Not Interpret Section 541 To Exclude Alter Ego Rights**

16 The Ninth Circuit, in *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248 (9th Cir. 2010), determined
17 that, under California law, generalized *alter ego* claims do not exist. *Ahcom*, 623 F.3d at 1252.
18 However, California law does not apply to the *alter ego* issues here, and *Ahcom* does not control.
19 *See* Tr. Am. Mem. ¶¶ 38-39; Tr. of Dec. 11, 2012 Status Conference at 28 (this Court
20 recognizing that the *Ahcom* holding was based on an interpretation of California law). In his
21 prior briefing, the Trustee demonstrated that courts applying the laws of at least **twelve** states
22 have held that *alter ego* claims (or remedies) against the former controllers of the debtor are
23 property of the debtor. *See* Tr. Am. Mem. ¶¶ 40-42; Tr. Reply at 9-10, 13-14.³ The Trustee
24 further demonstrated that substantive *alter ego* law in D.C. is consistent with the law of those
25

26

³ Chapter 11 Trustee's Amended Memorandum of Points and Authorities in Support of Motion for an Order Enforcing the Automatic Stay (Dkt. #885) ("Trustee's Amended Memorandum"); Chapter 11 Trustee's Reply to Oppositions to Stay Motion (Dkt. # 915) ("Trustee's Reply").

1 other states, and this Court should determine that the *alter ego* claims asserted by HC are
2 property of the Howrey estate. *See* Tr. Am. Mem. ¶¶ 43-49; Tr. Reply at 11-13.

3 To avoid an argument regarding the appropriate interpretation of D.C. *alter ego* law, the
4 Surrebuttal argues that, pursuant to *Ahcom*, if *alter ego* is a “remedy” rather than a “claim” under
5 the relevant state law, then the *alter ego* remedy is not property of the bankruptcy estate under 11
6 U.S.C. § 541. Surrebuttal at § I. In other words, *Ahcom* supposedly holds that Section 541
7 “weeds out” the *alter ego* remedy from the debtor’s estate. This reasoning is erroneous for at
8 least three reasons.

10 **First**, *Ahcom* did not hold that bankruptcy estates lack all *alter ego* remedies. Rather,
11 *Ahcom* determined that, under California law, **generalized** *alter ego* claims do not exist. *Ahcom*,
12 623 F.3d at 1252. In fact, courts have recognized that *Ahcom* allows for trustees to bring *alter*
13 *ego* remedies where coupled with substantive claims. *See Shaoxing County Huayue Imp. & Exp.*
14 *v. Bhaumik*, 191 Cal. App. 4th 1189, 1198-99 (Cal. App. 2011) (“The trustee of a bankrupt
15 corporation can maintain an action against a defendant based on an *alter ego* theory if there is
16 some allegation of injury to the corporation that gives the corporation a right of action against the
17 defendant.”); *Samson v. Rocky Mtn. Rec. Communities, LLC (In re Rocky Mtn. Rec.*
18 *Communities, LLC)*, 2012 WL 5248480, at *7 (Bankr. D. Mont. Oct. 23, 2012) (holding that a
19 trustee had standing to bring an *alter ego* remedy, consistent with *Ahcom*, because the trustee had
20 other substantive causes of action against the defendants, with *alter ego* serving as the trustee’s
21 remedy). Thus, bankruptcy estates clearly have some *alter ego* remedies under *Ahcom* and
22 California law, so it cannot be that Section 541 excludes all *alter ego* remedies.

25 **Second**, the ruling in *Ahcom* was not based on an interpretation of Section 541. *Ahcom*
26 did **not** hold that because, under California law, *alter ego* is a remedy rather than a claim, *alter*
ego is not contained within the debtor’s Section 541 bundle of rights. Nowhere does the Ninth

1 Circuit consider whether *alter ego* falls within the Section 541 definition of property of the
2 estate. Nowhere does the Ninth Circuit consider whether Section 541 includes “remedies” as
3 well as “claims.” Rather, the Ninth Circuit analyzes California’s *alter ego* law and reaches the
4 following conclusion: “Thus, we conclude that California law does not recognize an alter ego
5 claim or cause of action that will allow a corporation and its shareholders to be treated as alter
6 egos for purposes of all the corporation’s debts.” *Ahcom*, 623 F.3d at 1252. *Ahcom* held that no
7 entity has a generalized *alter ego* claim under California law. It did not hold that Section 541
8 somehow skims away the *alter ego* remedy that existed pre-bankruptcy.

10 **Third**, the Surrebuttal offers no logical explanation as to why a debtor’s Section 541
11 property does not include “remedies.” Damages and injunctive relief are types of remedies, yet
12 no one doubts that a debtor generally has the same rights to those remedies post-bankruptcy as it
13 had pre-bankruptcy. The Surrebuttal offers no basis for why Section 541 would discriminate
14 against the *alter ego* remedy.

16 Because D.C. law (not California law) will govern whether the Former Partners were
17 *alter egos* of Howrey, and because *Ahcom* was not based on an interpretation of Section 541,
18 *Ahcom* is not binding precedent here.

19 **II. HC’s Alleged Substantive Claim Is Property Of The Howrey Estate**

20 To state an *alter ego* remedy against the Former Partners, HC must first establish a
21 substantive claim against Howrey. *See, e.g., TAC-Critical Sys., Inc. v. Integrated Facility Sys.,*
22 *Inc.*, 808 F. Supp. 2d 60, 66-67 (D.D.C. 2011). The only substantive claim alleged in HC’s
23 Complaint is “money had and received.” As the Trustee has previously argued, the only basis
24 for a money had and received claim alleged in HC’s Complaint is money transferred from
25 Howrey to the Former Partners. *See* Am. Mem. at ¶¶ 28-33; Reply at 8-9. Such a claim is
26 Howrey’s property, not HC’s.

1 The Surrebuttal claims that “a common law count for money had and received embraces
2 the most general type of liability imaginable.” Surrebuttal at 5:18-19. Broad though a money
3 had and received claim may be, it does have some parameters, the principal one being that HC
4 must allege some way in which Howrey improperly received HC’s money. *See Gutierrez v.*
5 *Girardi*, 194 Cal. App. 4th 925, 937 (Cal. App. 2011) (holding that the claim “lies wherever one
6 person has received money which belongs to another, and which in equity and good conscience
7 should be paid over to the latter”) (citation omitted); *Holt v. Kormann*, 2012 WL 2150070, at *8
8 n.4 (C.D. Cal. June 12, 2012) (listing as an element of a money had and received claim that “the
9 defendant received a sum of money from the plaintiff”); *Rondberg v. McCoy*, 2009 WL
10 3017611, at *6 (S.D. Cal. Sept. 21, 2009) (holding that, to state a money had and received claim,
11 the plaintiff must show that “a definite sum, to which she is entitled, has been received by
12 defendant”) (citations omitted).
13
14

15 HC’s “**SOLE CLAIM FOR RELIEF**” (HC Complaint at 28:5) is money had and
16 received. The only possible money had and received claim described in HC’s Complaint is one
17 Howrey might bring against the Former Partners. There is not a single contention that Howrey
18 received HC’s or Jan Brown’s money. HC’s money had and received claim is plainly Howrey’s
19 claim.
20

21 **III. Relevant *Alter Ego* Law Supports The Motion To Enforce**

22 The Surrebuttal claims that “there is neither any DC law nor any federal common law
23 supporting the bald claim by the Trustee that he has a ‘general *alter ego* claim.’” Surrebuttal at
24 8:1-2. To the contrary, the Trustee has pointed out that courts applying the laws of at least the
25 jurisdictions of **Texas, Virginia, Ohio, Illinois, Indiana, North Carolina, Nevada, New York,**
26 **Utah, Georgia, Pennsylvania, and Delaware** have held that *alter ego* claims against the former
controllers of the debtor are property of the debtor. Tr. Mem. at 18-19. Moreover, one of these

1 courts was a D.C. court. *See Bd. of Directors of the Chestnut Grove Condominium Unit Owners'*
2 *Assoc. v. Resolution Trust Co.*, 161 B.R. 860, 862-63 (D.D.C. 1993) (Virginia law). And the
3 Trustee demonstrated that the factors courts looked to in concluding that the *alter ego* claims
4 were property of the bankruptcy estate in those other jurisdictions applied equally under D.C.
5 law. Tr. Mem. at 19-22. In short, there is no reason why D.C. law should be interpreted any
6 differently from the laws of the many jurisdictions under which trustees have the right to assert
7 *alter ego* remedies.

9 The Surrebuttal focuses on the fact that D.C. law, like California law, characterizes *alter*
10 *ego* as a “remedy” and not a “claim,” yet this fact is irrelevant. As noted in the Trustee’s Reply
11 Brief, courts concluding that *alter ego* is a remedy also hold that bankruptcy trustees have
12 exclusive standing to assert that remedy.⁴ Further, the Surrebuttal itself notes that describing
13 *alter ego* as a “remedy” rather than a “claim” is done “widely . . . throughout the United States.”
14 Surrebuttal at 4 n.6. Yet it is also widely recognized throughout the United States that *alter ego*
15 claims are exclusively controlled by trustees in bankruptcy. The Surrebuttal’s correlation
16 between “remedy” states and creditor-standing states simply does not hold up.

18 In response to the weight of authority, Mr. McGrane and HC cite the following few cases
19 for their position that D.C. law precludes the Trustee from recovering from the Former Partners
20 as *alter egos* of Howrey.

- 22 • *Estate of Raleigh v. Mitchell*, 947 A.2d 464 (D.C. 2008): This case has been
23 discussed extensively by the parties, and the dicta in that case supports the
24 Trustee’s standing to bring *alter ego* claims against the Former Partners. *See* Tr.
Reply at 11-12.

25 ⁴ *See* Tr. Reply at 13-14; *In re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1152 (5th Cir. 1987) (Texas law); *ANR Ltd., Inc.*
26 *v. Chattin*, 89 B.R. 898, 902 n.4 (D. Utah 1988) (citing *S.I. Acquisition*, but case decided under Utah law); *see also*
Raytheon Co. v. Boccard USA Corp., 369 S.W.3d 626, 638 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)
(recognizing that *alter ego* is a remedy and holding that “under Delaware and Pennsylvania law, a corporation,
particularly an insolvent one, has standing to pierce its own corporate veil under an alter ego theory to reach the
assets of its parent”).

- 1 • *TAC-Critical Sys., Inc. v. Integrated Facility Sys., Inc.*, 808 F. Supp. 2d 60
2 (D.D.C. 2011): This case supports the Trustee's contention that D.C. *alter ego*
3 law is consistent with the majority of jurisdictions that have held that *alter ego*
4 claims/remedies are property of the bankruptcy estate. See Tr. Am. Mem. at ¶¶
5 43-46.
- 6 • *Ahcom*: Even under *Ahcom* and California law, the Trustee has standing to pursue
7 *alter ego* remedies against the Former Partners, so long as those remedies are
8 coupled with substantive claims. See Trustee's Am. Mem. at 23 n.10.⁵
- 9 • *Mixon v. Anderson (In re Ozark Rest. Equip. Co., Inc.)*, 816 F.2d 1222, 1228 (8th
10 Cir. 1987): *Mixon* was decided under Arkansas law and, along with *Ahcom*,
11 represents the minority approach to trustee standing to pursue *alter ego* claims.
12 See *In re Buildings by Jamie, Inc.*, 230 B.R. 36, 43 (Bankr. D.N.J. 1998) (noting
13 that *Mixon* is the minority approach; holding that the bankruptcy trustee has
14 standing to bring *alter ego* claims under New Jersey law); *In re OODC, LLC*, 321
15 B.R. 128 (Bankr. D. Del. 2005) (noting that *Mixon* is the minority approach).
- 16 • *Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas*
17 *Petroleum, Inc.)*, 522 F.3d 575 (5th Cir. 2008): Mr. McGrane cited this case in a
18 special filing as evidence that the Trustee (a) was wrong on the law, and (b) tried
19 to mislead the Court. Mr. McGrane just got it wrong. *Seven Seas* directly
20 supports the Trustee's position. See Tr. Reply at 9-10.
- 21 • *Drabkin v. L&L Constr. Associates, Inc. (In re Latin Inv. Corp.)*, 168 B.R. 1
22 (Bankr. D.C. 1993): As demonstrated in the Trustee's Reply, this case is
23 irrelevant and was completely misrepresented by Mr. McGrane. Tr. Reply at 12-
24 13.

25 In sum, neither HC nor its counsel have cited any authority compelling the conclusion that, under
26 D.C. law, the Trustee cannot seek to recover from the Former Partners as *alter egos* of Howrey.

27 **IV. *In Pari Delicto* Is Irrelevant To Who Has Standing To Bring *Alter Ego* Claims, And 28 In Any Event It Would Not Bar The Trustee From Asserting Those Claims Against 29 The Former Partners**

30 The Surrebuttal argues that if the Trustee were precluded by *in pari delicto* from
31 recovering from the Former Partners as *alter egos*, then the *alter ego* cause of action does not
32 become property of the estate. See Surrebuttal at 9:10-10:7. But that is not true, and the cases

33
34
35
36 ⁵ The Surrebuttal states that the standing question in *Ahcom* "turned on whether applicable state law provided a
bankruptcy trustee with a 'general alter ego claim that it could assert on behalf of all creditors,' i.e., what we will
call a Self Piercing remedy." Surrebuttal at 16:7-8. The Surrebuttal ignores the difference between two concepts:
whether a state allows generalized *alter ego* claims, and whether state law allows self-piercing. *Ahcom* did not
address self-piercing at all.

1 the Surrebuttal cites say just the opposite. *Peterson* and *USACM* hold that whatever defenses to
2 the debtor's causes of action existed prepetition continue to burden those causes of action post-
3 petition. See *Peterson v. McGladrey & Pullen, LLP (In re Lancelot Investors Fund, L.P.)*, 676
4 F.3d 594, 598-99 (7th Cir. 2012); *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F.
5 Supp. 2d 1210, 1229 (D. Nev. 2011). They do not hold that causes of action subject to an *in pari*
6 *delicto* defense are excluded from the bankruptcy estate.⁶

7
8 Thus, the *in pari delicto* issue is red herring. It has nothing to do with who—the creditors
9 or the Trustee—may seek to recover from Howrey's Former Partners as *alter egos*.

10 Moreover, the defense would not apply to any efforts by the Trustee to recover from the
11 Former Partners as *alter egos*. The Trustee's Reply pointed out that *in pari delicto* likely would
12 not apply against the Former Partners because *in pari delicto* does not normally apply to suits
13 brought by a company against its own wrongdoing agents or partners. See Tr. Reply at 6-7. The
14 Surrebuttal contends that the cases cited in the Trustee's Reply only stand for the proposition that
15 *in pari delicto* does not apply against “‘insiders,’ as the term is non-exclusively defined at
16 Section 101(31)(B).” Surrebuttal at 8:13-15. But that is not true. The exception to the *in pari*
17 *delicto* defense that allows debtors to sue its former agents is not limited to or defined by
18 “insiders,” as defined at Section 101(31)(B). See *In re Oakwood Homes Corp.*, 356 Fed. Appx.
19 622, 628 (3d Cir. 2009). Section 101(31) does not have any bearing at all on the issue.⁷
20
21

22
23 ⁶ The Second Circuit, applying New York law, has held that a debtor does not have standing to sue a third party for
24 defrauding a corporation with the cooperation of management. Such a claim accrues to creditors. See *Shearson*
25 *Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991). This elevation of *in pari delicto* to a standing
26 issue has been rejected in an unpublished decision of the Ninth Circuit and by courts in the Ninth Circuit. See
CarrAmerica Realty Corp. v. Nvidia Corp., 302 Fed. Appx. 514, 517 (9th Cir. 2008); *Donell v. Nixon Peabody LLP*,
2012 WL 3839402, at *5 (C.D. Cal. Sept. 5, 2012). It is not followed under D.C. law, either. See *In re Greater*
Southeast Comm. Hosp. Corp. I, 353 B.R. 324, 369 (Bankr. D.D.C. 2006) (treating *in pari delicto* as a defense, not
an issue of standing).

⁷ The Surrebuttal contends that none of the cases cited by the Trustee “involve limited liability partnerships.”
Surrebuttal at 15-17. True, but two involved limited partnerships. See *Goldin v. Primavera Familienstiftung, TAG*
Assocs. (In re Granite Partners, L.P.), 194 B.R. 318 (Bankr. S.D.N.Y. 1996); *Tese-Milner v. Beeler (In re Hampton*

1 Even if, as the Surrebuttal suggests, the “insider” exception to *in pari delicto* requires a
2 showing of control over the debtor by the defendant (*see* Surrebuttal at 8:18-9:5), it is likely
3 those Former Partners who controlled Howrey that would be subject to the *alter ego*
4 remedy/claim. The Surrebuttal cites *Quinn v. Butz*, 510 F.2d 743, 757-58 (D.C. Cir. 1975), to
5 describe the conditions under which the *alter ego* doctrine will be applied: “Here we speak not
6 merely of single ownership, or of deliberate adoption and use of a corporate form in order to
7 secure its legitimate advantages, but of such domination of a corporation as in reality to negate
8 its separate personality.” Surrebuttal at 9 n.10. Any Former Partners who so dominated Howrey
9 as to give rise to *alter ego* liability would also surely exercise the same control over Howrey as
10 would trigger the “insider” exception to *in pari delicto*.⁸ Thus, *in pari delicto* would not prevent
11 the Trustee from recovering from at least the Former Partners that could be subject to *alter ego*
12 liability at all.
13

14
15 For these reasons, the *in pari delicto* defense would not bar the Trustee’s *alter ego* claims
16 against the Former Partners, but even if it did, that would have no bearing on whether or not the
17 *alter ego* claims asserted by HC are property of the Howrey estate.

18 **V. No Creditor Has Come To HC’s Defense Of Its Attempts To Independently Assert**
19 **The Trustee’s *Alter Ego* Claims**

20 The Surrebuttal argues that this Court should deny the Motion to Enforce so that the *alter*
21 *ego* claims of the class members may be resolved in a confirmed plan. Surrebuttal at 12-1-8.
22 But this argument assumes that the class members have *alter ego* claims to resolve. As the
23

24 *Hotel Investors, L.P.*), 289 B.R. 563, 577 n.23 (Bankr. S.D.N.Y. 2003). And none of the cases cited by HC or its
25 counsel for the proposition that *in pari delicto* would apply to the Trustee’s claims involved suits against the former
26 partners of a limited liability partnership, or of any kind of partnership. *See* McGrane Opp. at 4. Those cases all
involved suits against third parties that previously provided services to the debtor.

⁸ The Surrebuttal footnotes *Estate of Raleigh* in its section addressing *in pari delicto*. Surrebuttal at 8 n.9. *In pari delicto* is mentioned nowhere in *Estate of Raleigh*. The other aspects of *Estate of Raleigh* raised in the Surrebuttal are addressed in the Trustee’s Reply at pages 11-12.

1 Trustee has demonstrated, they do not have any such claims.

2 Moreover, HC's vision of a multi-party negotiation leading to a confirmed plan that will
3 involve the HC class and others is a mirage. As discussed in the Trustee's Amended
4 Memorandum, the HC class is not certifiable. *See* Tr. Am. Mem. at 15:17-16:8. And even if it
5 were, many creditors would likely opt out to urge their individual, alleged *alter ego* rights.
6

7 Finally, HC is apparently the only creditor in favor of HC's pursuing *alter ego* claims
8 against the Former Partners. No creditor has filed any paper or appeared in support of HC's
9 complaint or in opposition to the Motion to Enforce. Howrey's largest creditor—Citibank,
10 N.A.—has filed a brief supporting the Motion to Enforce, as has the Official Committee of
11 Unsecured Creditors. In fact, the Creditors' Committee has moved to have Mr. McGrane
12 disqualified from representing HC. Apparently the only creditor that wants HC's class action to
13 go forward is HC itself—an entity designed by Mr. McGrane to purchase a \$994.25 claim for the
14 purpose of bringing HC's *alter ego* action.
15

16 Far from promoting a “comprehensive resolution” of the Former Partners' liabilities,
17 HC's actions have effectively eliminated the Trustee's ability to exercise his court-appointed
18 duties to bring resolution with the Former Partners. Many Former Partners would be willing to
19 settle, but not if the Trustee is unable to offer them total releases. It is for that precise reason that
20 the Trustee was granted sole authority to negotiate a resolution of those claims on behalf of the
21 estate, and it is for that precise reason that HC and its counsel violated the automatic stay by
22 filing the complaint. For all these reasons, the Court should enforce the automatic stay and
23 require HC and its counsel to immediately dismiss the complaint and cease their efforts to
24 exercise control over Howrey estate property.
25

26 CONCLUSION

For all the reasons stated above, and in the Trustee's prior briefing in support of the

1 Motion to Enforce, this Court should grant the Motion to Enforce so that the Trustee can
2 continue with the work of marshaling the assets of the Howrey estate.

3
4 Dated: January 4, 2013

5 Respectfully submitted,

6 /s/ Andrew B. Ryan

7 Stephen T. Loden (*pro hac vice*)

8 J. Benjamin King (*pro hac vice*)

9 Andrew B. Ryan (*pro hac vice*)

10 **DIAMOND MCCARTHY LLP**

11 909 Fannin, 15th Floor

12 Houston, TX 77010

13 Telephone: 713-333-5100

14 Facsimile: 713-333-5199

15 Eric A. Nyberg, Esq. (Bar No. 131105)

16 Chris D. Kuhner, Esq. (Bar No. 173291)

17 **KORNFIELD, NYBERG, BENDES & KUHNER, P.C.**

18 1970 Broadway, Suite 225

19 Oakland, CA 94612

20 Telephone: 510-763-1000

21 Facsimile: 510-273-8669

22 *Counsel for Allan B. Diamond, Chapter 11 Trustee*
23 *for Howrey LLP*
24
25
26

CERTIFICATE OF SERVICE

X (CM/ECF) The document was electronically served on the parties to this action via the mandatory United States Bankruptcy Court of California CM/ECF system upon filing of above described document:

SEE ATTACHED SERVICE LIST

X (ELECTRONIC MAIL SERVICE) By electronic mail (e-mail) the above listed document(s) without error to the email address(es) set forth below on this date:

SEE ATTACHED SERVICE LIST

____ (UNITED STATES MAIL) By depositing a copy of the above-referenced documents for mailing in the United State Mail, first class postage prepaid, at Houston, Texas, to the parties listed at their last known mailing addresses, on this date:

SEE ATTACHED SERVICE LIST

____ (OVERNIGHT COURIER) By depositing a true and correct copy of the above referenced document for overnight delivery via Federal Express, at a collection facility maintained for such purpose, addressed to the parties on the attached service list, at their last known delivery address, on the date above written.

____ (COURIER SERVICE) By providing true and correct copies of the above referenced documents [with copies of the supporting detailed invoices/attorney time records for the Final Fee Application] via courier delivery, to the following on or about _____:

_____(FACSIMILE) That I served a true and correct copy of the above-referenced document via facsimile, to the facsimile numbers indicated, to those people listed on the attached service list, on the date above written.

/s/ J. Benjamin King

J. Benjamin King

1 **VIA CM/ECF:**

2 **United States Trustee**

Minnie Loo, Esq.
Donna S. Tamanaha, Esq.
Office of the U.S. Trustee
235 Pine Street. 7th Floor
San Francisco, CA 94104-3484
Email: Minnie.Loo@usdoj.gov
Email: Donna.S.Tamanaha@usdoj.gov

7 **Chapter 11 Trustee**

Allan B. Diamond
Diamond McCarthy, LLP
Two Houston Center
909 Fannin Street, Suite 1500
Houston, Texas 77010
Email: adiamond@diamondmccarthy.com

11 **Counsel for the Chapter 11 Trustee**

Diamond McCarthy, LLP
Howard D. Ressler, Esq.
Email: hressler@diamondmccarthy.com
Stephen T. Loden, Esq.
Email: sloden@diamondmccarthy.com
Jason M. Rudd, Esq.
Email: jrudd@diamondmccarthy.com

Kornfield Nyberg Bender & Kuhner P.C.
Eric Nyberg
Email: e.nyberg@kornfieldlaw.com
Chris D. Kuhner
Email: c.kuhner@kornfieldlaw.com

19 **Debtor's Counsel**

Wiley Rein LLP
H. Jason Gold
Valerie P. Morison
Dylan G. Trache
Email: jgold@wileyrein.com
Email: vmorrison@wileyrein.com
Email: dtrache@wileyrein.com

Murray & Murray
Robert A. Franklin
Craig M. Prim
Jenny Lynn Fountain
Email: rfranklin@murraylaw.com
Email: cprim@murraylaw.com
Email: jfountain@murraylaw.com

Duane Morris LLP

Geoffrey A. Heaton, Esq.
Email: gheaton@duanemorris.com
Aron M. Oiner, Esq.
Email: roliner@duanemorris.com

Law Offices of Latham & Watkins

Kimberly A. Posin, Esq.
Email: kim.posin@lw.com

Murray & Murray

Craig M. Prim, Esq.
Email: cprim@murraylaw.com
Robert A. Franklin, Esq.
Email: rfranklin@murraylaw.com
Jenny L. Fountain, Esq.
Email: jlfountain@murraylaw.com

Official Committee of Unsecured Creditors

Whiteford, Taylor & Preston LLP

Bradford F. Englander, Esq.
Email: benglander@wtplaw.com
John F. Carlton, Esq.
Email: jcarlton@wtplaw.com
Justin P. Fasano, Esq.
Email: jfasano@wtplaw.com

Counsel for The Irvine Company, LLC

Allen Matkins, et al.
Email: mgreger@allenmatkins.com

Counsel for Creditor Citibank, N.A.

Paul, Weiss, Rifkind, Wharton & Garrison
Larry Peitzman, Esq.
Email: lpeitzman@pwkllp.com

Counsel for Creditor Protiviti, Inc.

Pachulski, Stang, Ziehl & Jones
John D. Fiero, Esq.
Email: jfiero@pszilaw.com

Counsel for Creditor Oracle America, Inc.

Buchalter Nemer
Shawn M. Christianson, Esq.
Email: schristianson@buchalter.com

**Counsel for Creditor U.S. Bank, N.A.,
as Trustee**

Perkins Coie LLP
David J. Gold, Esq.
Email: dgold@perkinscoie.com

<p>1</p> <p>2</p> <p>3 Counsel for Attorneys' Liability Assurance</p> <p>4 Society, Inc., A Risk Retention Group</p> <p>5</p> <p>6 Counsel for Creditors Advanced Discovery</p> <p>7 LLc, Give Something Back, Inc., Jan Brown</p> <p>8 & Associates, Kent Daniels & Associates, Inc.,</p> <p>9 L.A. Best Photocopies, Inc., Western</p> <p>10 Messenger Service, Inc.</p> <p>11</p> <p>12 Counsel for BP/CGCENTER I, LLC</p> <p>13</p> <p>14 Counsel for Creditor Warner Investment, L.P.</p> <p>15</p> <p>16 Counsel for Creditor Dewey & LeBoeuf LLP</p> <p>17</p> <p>18 Counsel for Creditor Iron Mountain</p> <p>19 Information Management Inc.</p> <p>20</p> <p>21 Counsel for Creditor Hines REIT 321</p> <p>22 North Clark Street, LLC</p> <p>23</p> <p>24 Counsel for Creditor Stephanie Langley</p> <p>25</p> <p>26 Counsel for Creditor Stephanie Langley</p> <p>Counsel for Creditor Pension Benefit</p> <p>Guaranty Corp.</p> <p>Counsel for Interested Party Connecticut</p>	<p>Gabriel Liao, Esq. <i>Email: gliao@perkinscoie.com</i></p> <p>Perkins Coie LLP Alan D. Smith, Esq. <i>Email: adsmith@perkinscoie.com</i></p> <p>Trepel McGrane Greenfield LLP Maureen A. Harrington, Esq. <i>Email: mharrington@tmcglaw.com</i> Christopher D. Sullivan, Esq. <i>Email: csullivan@tgsdlaw.com</i></p> <p>Allen, Matkins, Leck, Gamble and Mallory William W. Huckins <i>Email: whuckins@allenmatkins.com</i></p> <p>McKenna Long and Aldridge LLP Gregg S. Kleiner, Esq. <i>Email: gkleiner@mckennalong.com</i></p> <p>Dewey and LeBoeuf Paul S. Jasper, Esq. <i>Email: pjasper@dl.com</i></p> <p>Bartlett, Hackett and Feinberg Frank F. McGinn, Esq. <i>Email: ffm@bostonbusinesslaw.com</i></p> <p>DLA Piper LLP Frank T. Pepler, Esq. <i>Email: frank.pepler@dlapiper.com</i></p> <p>Outten and Golden LLP Rene S. Roupinian, Esq. <i>Email: rst@outtengolden.com</i></p> <p>Law Offices of James D. Wood James D. Wood, Esq. <i>Email: jdwood@jdwoodlaw.com</i></p> <p>Office of the Chief Counsel John Holland Ginsberg, Esq. <i>Email: ginsberg.john@pbgc.gov</i></p> <p>Schnader Harrison Segal and Lewis</p>
---	--

1 **General Life Insurance Company**

Melissa Lor, Esq.
Email: MLor@Schnader.com

2
3 **Counsel for Interested Party Ad Hoc**
4 **Committee of Certain Former Howrey**
5 **Partners**

MacConaghy and Barnier
John H. MacConaghy, Esq.
Email: macclaw@macbarlaw.com
Monique Jewett-Brewster, Esq.
Email: mjewettbrewster@macbarlaw.com

6 **Counsel for Howrey Claims LLC**

McGrane LLP
William McGrane, Esq.
Email: william.mcgrane@mcgranellp.com

7
8 **Counsel for Interested Party Connecticut**
9 **General Life Insurance Co.**

Melissa Lor
Email: mlor@schnader.com

10 **Counsel for Creditor Knickerbocker**
11 **Properties, Inc. XXXIII**

Seyfarth Shaw LLP
Scott Olson, Esq.
Email: solson@seyfarth.com

12 **Counsel for Creditor Banc of America**
13 **Whiteford**
14 **Leasing & Capital, LLC**

Law Offices of Serlin and

Mark A. Serlin, Esq.
Email: mserlin@globelaw.com

15 **Counsel for Creditor Texas Comptroller**
16 **of Public Accounts**

Bankruptcy & Collections Division
Kimberly Walsh, Esq.
Email: bk-kwalsh@oag.state.tx.us

17
18 **Counsel for Creditor 200 S. Main Street**
19 **Investors, LLC**

Ballard Spahr Andrews and Ingersoll
Rebecca J. Winthrop, Esq.
Email: WinthropR@ballardspahr.com
Penny M. Costa, Esq.
Email: costap@ballardspahr.com

20
21 **Counsel for Creditor Citibank, N.A.**

Peitzman Weg LLP
Larry Peitzman, Esq.
Email: lpeitzman@peitzmanweg.com

22
23 **Counsel for Amy J. Fink**

Jones Day
Robert A. Trodella
Email: rtrodella@jonesday.com

24
25
26 **Counsel for Harris County**

Linebarger Goggan Blair & Sampson
LLP
John P. Dillman
Email: houston_bankruptcy@lgbs.com

**Counsel for Informal Group of Certain
Former Howrey Attorneys**

Dumas & Clark LLP

Cecily A. Dumas

Email: Cecily.dumas@dumasclark.com

Robert E. Clark

Email: Robert.clark@dumasclark.com

Counsel for SAP America, Inc.

Cooper White & Cooper LLP

Peter C. Califano

Email: pcalifano@cwclaw.com

Counsel for SAP America, Inc.

Brown & Connery LLP

Donald K. Ludman, Esq.

Email: dludman@brownconnery.com

Counsel for McKenna Long and Aldridge

Michael A. Isaacs, Esq.

Email: misaacs@mckennalong.com

aworthing@mckennalong.com

Counsel for Jeffrey M. Judd

Judd Law Group

Jeffrey M. Judd, Esq.

Email: jeff@juddlawgroup.com

melanie@juddlawgroup.com

Counsel for McGrane LLP

William Joseph Walraven, Esq.

Email: anna.song@mcgranellp.com

Counsel for Cooper US, Inc.

Cooper Industries, Inc.

Paula Beck Whitten, Esq.

Email:

paula.whitten@cooperindustries.com

VIA EMAIL:

Counsel for Creditor Citibank, N.A.

**Paul, Weiss, Rifkind, Wharton &
Garrison**

Kelley A. Cornish, Esq.

Email: kcornish@paulweiss.com

Diane Meyers, Esq.

Email: dmeyers@paulweiss.com

Jacob J. Adlerstein, Esq.

Email: jadlerstein@paulweiss.com

ayoung@paulweiss.com

Ballard Spahr LLP

Matthew Moncur, Esq.

Email: moncurm@ballardspahr.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EMC Corporation
c/o Receivable Management Services
Steven Sass, Esq.
Email: steven.sass@rmsna.com
Ronald Rowland, Esq.
Email: Ronald.rowland@rmsna.com

Olin Corporation
S. Christian Mullgardt
Email: scmullgardt@olin.com

Counsel for Howrey Claims LLC

**Klein Denatale Goldner Cooper Rosenlieb
& Kimball LLP**
Christian D. Jinkerson, Esq.
Email: jjinkerson@kleinlaw.com

Interested Party William McGrane

Email:
william.mcgrane@mcgranellp.com